IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1970
No. 1 5 4 4

SWANNEY-McDONALD, Inc.,

Petitioner,

vs.

OTTO D. GRAY, etc., et al.,

Respondents.

SWANNEY-McDONALD, Inc.,

Petitioner,

vs.

WILLIAM LAWMAN,

Respondent.

ON PETITION FOR A WRIT
OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. A-1 - A-5) is reported at 436 F. 2d 652. The

findings and conclusions of the district court (C. T. 272-275)[1/] are not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 4, 1971. The petition for rehearing en banc was denied on February 1, 1971. The petition for a writ of certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the court of appeals correctly ruled that employees of petitioner, who regularly towed disabled and wrecked vehicles from interstate highways, and removed glass and other obstructions, were engaged

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1/ "C. T. " references are to the Clerk's Transcript which is the appendix on appeal under Rule 4 of the Court of Appeals for the Ninth Circuit. "R. T. " references are to the Reporter's Transcript. "Pet. A" references are to petitioner's appendix.

"in commerce" within the meaning of the Fair Labor Standards Act.

2. Whether the court of appeals correctly ruled that towing services performed by petitioner for auto clubs and automotive repair shops were sales for resale within the meaning of Section 13 (a)(2) of the Fair Labor Standards Act.

3. Whether the court of appeals correctly ruled that the joinder of eleven plaintiffs in a single action did not convert the individual suits into a "collective or class action" within the meaning of Section 7 of the Portal-to-Portal Act and Section 16 (b) of the Fair Labor Standards Act.

STATUTES INVOLVED

Sections 3 (b) and 16 (b) of the Fair Labor Standards Act of 1938, 52 Stat. 1060, as amended, 29 U.S.C. 201, et seq., and Section 7 of the Portal-to-Portal Act of 1947, 61 Stat. 84, 29 U.S.C. 251, et seq., are set forth at pp. 4-6 of petitioner's brief. The other relevant statutory provisions provide in pertinent part as follows:

> "SEC. 13 (a), FAIR LABOR STANDARDS ACT. The provisions of sections 6 and 7 [the Act's minimum wage and overtime

provisions] shall not apply with respect to * * *

"(2) any employee employed by any retail or service establishment, * * * if more than 50 per centum of such establishment's annual dollar volume of sales of goods or services is made within the State in which the establishment is located * * *. A 'retail or service establishment' shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry; * * *." 2/

"SEC. 5, PORTAL-TO-PORTAL ACT. Representative Actions Banned. --

"(a) The second sentence of section 16 (b) of the Fair Labor Standards Act of 1938, as amended, is amended to

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2/ The Fair Labor Standards Amendments of 1966 (80 Stat. 830), which became effective on February 1, 1967 (subsequent to the filing of the complaints in these actions), made some changes, not relevant here, in the wording of Section 13 (a) (2).

read as follows: 'Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.'

"SEC. 6, PORTAL-TO-PORTAL ACT. Statute of Limitations. -- Any action commenced on or after the date of the enactment of this Act to enforce any cause of action for unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act -- (a) if the cause of action accrues on or after the date of the enactment of this Act -- may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued * * * ."

STATEMENT

These consolidated actions were brought under Section 16 (b) of the Fair Labor Standards Act by 12 named employees to recover unpaid overtime compensation, liquidated damages, and counsel fees. Petitioner admitted non-compliance with the Act's overtime requirements but denied that these employees, who worked as tow truck drivers, were engaged in commerce within the meaning of the Act, and claimed as an affirmative defense that its business was exempt under Section 13 (a) (2) as a "retail or service establishment."

Petitioner SWANNEY-McDONALD, INC. is a California corporation engaged in the business of providing towing and emergency repair services to wrecked and disabled vehicles, trucks, freight and passenger carriers in the commercial and industrial area of the City of Los Angeles and on more than ten specifically listed United States National Interstate Highways.

Respondents made from three to four calls per day to a minimum of three to five calls per week on the National Interstate Freeways throughout the entire two-year period covered by Respondents' employment (R. T. 25, 62, 250).

On these calls Respondent tow truck operators would remove disabled wrecked and overturned vehicles, glass, debris and other materials obstructing the free flow of traffic

on the various interstate freeways. Their activities ran the gamut from removing disabled automobiles on the various U.S. Highways, with broken axles and broken wheels, to removing and hauling 25 car multiple wrecks from the freeway, which necessitated the use of every piece of tow equipment and truckdriver employed by Petitioner (R. T. 269-272). It included the clearing of dead bodies from disabled automobiles and wrecks on the interstate freeways to the righting of overturned, highly explosive double trailer, butane tractor trailers blocking movement of traffic on freeways in both directions (R. T. 238-243).

In addition to towing and servicing wrecked or disabled vehicles Petitioner sold unclaimed vehicles which were damaged beyond repair to the SWANNEY-McDONALD AUTO WRECKING COMPANY, which was located at the Los Angeles Harbor, some 15 miles distant from Petitioner's place of business. Each month Respondent drivers collectively towed from 20 to 40 such vehicles from Petitioner's garage to the wrecking firm, located at the harbor, where they would be cut up and sent over seas in foreign commerce (R. T. 24-25).

Petitioner received part of its income from individual car owners. In addition to this business, however, Petitioner performed considerable work for automobile clubs, repair garages and car dealers (R. T. 12, 95-96, 260). Indeed, approximately 20 percent of petitioner's annual dollar volume was derived from one auto

club alone (R.T. 96). This customer, the National Automobile Club, had a contract with Petitioner, under which Petitioner was required to provide its members with towing and emergency repair services in the downtown area (R. T. 12, 70, 96, 101, 110-111, 138-139). The auto club, like the repair shops and car dealers, was billed on a monthly basis at rates considerably below those charged individual car owners (R. T. 138, 185-188, 191-192, 294). Although the auto club and repair shops did not charge their members and customers directly for the towing services, they considered these services in determining membership fees and repair costs (R. T. 132-133).

Both the district court and the court of appeals ruled that the activities of the tow truck drivers constituted an engagement "in commerce" within the meaning of the Act (R. T. 20; C. T. 272-275; Pet. A-1 - A-5). The district court nonetheless dismissed the complaints, concluding that petitioner met the tests for an exempt "retail or service establishment," including the requirement that "75 per centum [of its] annual dollar volume of sales or services (or of both) is not for resale" (C. T. 272-275). The court of appeals reversed, holding that the services performed under arrangements with auto clubs and repair shops were sales for resale, since the cost of such services was passed on to the automobile owners in the form of increased membership fees and repair rates (Pet. A-3 - A-4). Because petitioner failed to prove that these transactions comprised no more than 25 percent of its annual sales volume, the exemption

was held to be inapplicable.

The court of appeals also reversed the district court's ruling that the individual respondents were subject to the "written counsent" requirement of Section 7 of the Portal-to-Portal Act, applicable only to collective or class actions, and that therefore the statute of limitations was not tolled by the filing of the complaints, but continued to run until interrogatories, signed by each respondent, were filed six months later (C. T. 272-273). In reversing this holding, the court of appeals ruled that the joinder of several plaintiffs in a single action did not convert their individual suits into a "collective or class action" (Pet. A-4 - A-5).

ARGUMENT

The decision below is correct; it accords with principles well settled by the decisions of this Court, and does not conflict with decisions of any other court of appeals.

1. In holding that petitioner's employees were "engaged in commerce," the court of appeals applied the rule stated by this Court in Overstreet v. North Shore Corp., 318 U. S. 125, 128-129 (1943), that employees engaged in maintaining and improving instrumentalities of interstate commerce, and in keeping such instrumentalities free from obstruction, are engaged "in commerce" within the meaning of the Act. 3/

3/ In Overstreet, where the employer, like petitioner, stressed the local nature of its

As this Court subsequently stated in Alstate Construction Co. v. Durkin, 345 U.S. 13 (1953), "roads and railroads are in law and in fact integrated and indispensable parts of our system of commerce among the states," and "he who serves interstate highways and railroads serves commerce" (345 U.S. at 16).

3/ (Continued)

activities, this Court held that employees engaged in operating, maintaining and repairing a privately owned toll road and drawbridge connecting an interstate highway with an island were "so intimately related to interstate commerce 'as to be in practice and in legal contemplation a part of it' * * *," since "without their services these instrumentalities would not be open to the passage of goods and persons across state lines" (318 U.S. at 130). The Overstreet rationale has been applied in numerous decisions upholding the Act's coverage: Wirtz v. B. B. Saxon Company, 365 F. 2d 457 (C.A. 5) (employees maintaining and sweeping air base runways); Austford v. Goldberg, 292 F. 2d 234 (C.A. 8) (employees repairing and maintaining county, township and State roads); Crook v. Bryant, 265 F. 2d 541 (C.A. 4) (employees providing wrecker and towing services on an intrastate segment of a turnpike); Ritch v. Puget Sound Bridge & Dredging Co., 156 F. 2d 334 (C.A. 9) (employees dredging channels in navigable waters); Walling v. McCrady Const. Co., 156 F. 2d 932 (C.A. 3), cert. den. 329 U.S. 785 (employees repairing and relocating roads, streets, and bridges).

The fact that petitioner derived only a small part of its income from services performed on interstate freeways[4/] does not, as petitioner contends, remove its employees from the Act's protection. These employees admittedly provided towing and road services to interstate highways on a regular and recurring basis. This being so, the doctrine of de minimis does not apply. Maryland v. Wirtz, 392 U.S. 183 (1968); Mabee v. White Plains Publishing Co., 327 U.S. 178 (1946).[5/]

4/ Petitioner's claim that such services comprised less than 1% of its business is not factually accurate. Based on figures offered by petitioner's president at trial, the percentages run from 6% to 9% (R.T. 147-149).

5/ Among the more recent of numerous decisions sustaining coverage for employees who participate regularly and recurringly in interstate activities -- even where such activities comprise only a small fraction of the employer's total business and do not require substantial time for performance -- are: Shultz v. Kip's Big Boy, 431 F.2d 530 (C.A. 5, 1970); Wirtz v. F. M. Sloan, Inc., 411 F.2d 56 (C.A. 3, 1969); Wirtz v. Durham Sandwich Co., Inc., 367 F.2d 810 (C.A. 4, 1966); Dickenson v. U.S., 353 F.2d 389 (C.A. 9, 1965), cert. denied 384 U.S. 908; Wirtz v. Crystal Lake Crushed Stone Co., 327 F.2d 455 (C.A. 7, 1964); Telephone Answering Service v. Goldberg, 290 F.2d 529 (C.A. 1, 1961).

2. The court of appeals correctly held that the Section 13 (a) (2) exemption was not applicable in the absence of any proof that petitioner's sales to auto clubs and repair shops did not exceed 25 percent of its total sales.[6] The court's ruling that these services were sales for resale accords with the decisions of every court of appeals that has ruled on the "resale" issue.

Contrary to petitioner's contention (Pet. 25), the "resale" test applies not only to sales of goods but -- by its very terms -- to "sales of goods or services (or of both) * * * " (emphasis added). Moreover, as the court of appeals recognized, the "resale" nature of these transactions is not destroyed by the fact that the auto clubs and repair shops did not specifically bill their members (or customers) for towing and road repair services, but rather absorbed

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6/ It is, of course, well settled that exemptions from the Fair Labor Standards Act "are to be narrowly construed against the employers seeking to assert them" and that the burden of proof is upon the employer to show that he comes "plainly and unmistakably within their terms and spirit." Arnold v. Ben Kanowsky, Inc., 361 U.S. 388, 392, 394; Mitchell v. Kentucky Finance Co., 359 U.S. 290-291, 295; Phillips Co. v. Walling, 324 U.S. 490, 493.

these costs as overhead.

Directly in point is Mitchell v. Sherry Corine Corp., 264 F. 2d 831, cert. den. 360 U. S. 934 (1959). In that case, the operator of an airport dining room contended that its sales of flight meals were not sales for resale since the purchasing airline did not specifically charge its passengers for the meals. Rejecting this contention, the court pointed out that the meals "are purchased by the airline not for self-consumption but for consumption by the passengers and although no separate specific charge is made, the cost is an operating expense taken into account in computing the rates of transportation" (264 F. 2d at 835).

This ruling in Sherry Corine was held to be "determinative" in Goldberg v. Furman Beauty Supply, Inc., 300 F. 2d 16, where the Third Circuit ruled that the sales by a supplier of lotions, rinses and other preparations to various beauty parlors were "for resale" even though the beauty parlors did not charge their customers separately for supplies used in whatever services the beautician performed for the customer.

Sherry Corine was also cited by this Court in Arnold v. Ben Kanowsky, Inc., 361 U. S. 388 (1960), where it held that sales of aircraft parts "made with the expectation that the parts would be incorporated in aircraft and that the aircraft would be sold * * * are clearly within the concept of resale"

(361 U.S. at 394). Applying this principle to the instant case, the court of appeals held that the services performed by petitioner under arrangements with auto clubs and repair shops also came within the resale concept. As the court explained, these services were part of the total package provided by auto clubs and repair shops to the individual car owner; their cost was considered in determining membership fees and repair rates and petitioner's services were thus resold as surely as if they had been part of an itemized bill.

Since sales to the one auto club were shown to comprise approximately 20 percent of petitioner's annual dollar volume of business, and since petitioner made no attempt to show the extent of its sales to repair shops, the court of appeals was clearly correct in holding that petitioner had failed to prove one of the "explicit prerequisites to exemption" (Arnold v. Ben Kanowsky, Inc., supra, 361 U.S. at 392). As this Court ruled in Idaho Sheet Metal Works v. Wirtz, 383 U.S. 190 (1966), in any case where there is "unclarity as to the precise percentages of dollar volume attributable to the various sales, * * * the employer's burden of proof has not been met," and the exemption cannot be sustained (383 U.S. at 209).

3. The court of appeals correctly held that the joinder in one complaint of eleven named plaintiffs, pleading separate causes of action, was not a "collective or class" action within the meaning of Section 7 of the Portal-to-

Portal Act. This holding not only accords with numerous district court decisions, 7/ but it also is the only conclusion consistent with the legislative history and limited purpose of the "written consent" requirement added to Section 16 (b) of the Fair Labor Standards Act by Section 5 of the Portal-to-Portal Act, and applied to the statute of limitations provisions by Section 7 of the Act.

Section 7 provides that for purposes of the two-year statute of limitation (set forth in Section 6 of the Portal-to-Portal Act) an action under the Fair Labor Standards Act "shall be considered to be commenced on the date when the complaint is filed * * * ." The one exception to this general rule is that

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7/ Stephens v. Asker, 18 WH Cases 706, 59 CCH Lab. Cas. para. 32, 127 (M.D. Fla. 1967, not officially reported), affirmed per curiam 394 F.2d 513 (C.A. 5); Jeter v. International Harvester Co., 17 WH Cases 661, 55 CCH Lab. Cas. para. 31, 913 (N.D. Tex. 1966, not officially reported); Wallace v. Water Tank Service Company, 256 F.Supp. 689 (W.D. Okla. 1966); Mitchell v. Mace Produce Co., 163 F.Supp. 342 (D. Md. 1958); McDonald v. Martinelli, 120 F.Supp. 383 (S.D. N.Y. 1950); McDonald v. Martinelli, 120 F.Supp. 382 (S.D. N.Y. 1953); and Deley v. Atlantic Box & Lumber Corp., 119 F.Supp. 727 (D. N.J. 1954).

"in the case of a collective or class action" it shall not be considered to be commenced "in the case of any individual claimant" until such claimant has filed with the court "his written consent to become a party plaintiff." While Section 7 does not specifically define what is meant by "a collective or class action," the term, as the court of appeals recognized, obviously has reference to certain representative actions authorized by Section 16 (b) of the Fair Labor Standards Act, as amended by Section 5 of the Portal-to-Portal Act. This section, as amended, provides that actions may be brought "by one or more employees for and in behalf of himself or themselves and other employees similarly situated," but that no employee "shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party" and such consent is filed in court (emphasis added).

That the term "collective or class action" refers only to such representative actions -- and not to actions brought by several individually named plaintiffs -- is confirmed by the legislative history of the Portal-to-Portal Act. Thus, the Conference Report, in explaining Section 7, states that a "collective action [is] an action brought by an employee or employees for and in behalf of himself or themselves and other employees similarly situated, and a class action [is] an action described in Rule 23 of the Federal Rules of Civil Procedure." H. Rep. No. 326, 80th Cong., 1st Sess., p. 14,

emphasis added.

Similarly, with respect to Section 5, which amended Section 16 (b) of the Fair Labor Standards Act so as to require written consents in certain limited instances, the Report states that although "collective actions brought by an employee or employees (a real party in interest) for and in behalf of himself or themselves and other employees similarly situated may continue to be brought," "no employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court" (H. Rep. No. 326, supra, p. 13, emphasis added).

It is apparent from these legislative excerpts, as pointed out by the court of appeals, that the sole purpose for requiring written consents was to limit the "res judicata effect" of a Section 16 (b) action to those persons actually named and made known to defendant (Pet. A-5). The first of the two actions filed here was not a class suit brought by one or more employees on behalf of other unidentified employees.

The Respondents' First Amended Complaint specifically and separately named eleven plaintiffs. The introduction to the complaint was on behalf of each plaintiff. There was no allegation that the suit was commenced on behalf of any other employee similarly situated. The parties were known, specifically named and each plaintiff alleged

his individual citizenship, a specific and different employment period, and separate causes of action, although not separately stated, for overtime work for the defendant (C. T. p. 5). The prayer of the Amended Complaint prayed for judgment on behalf of the specifically named plaintiffs for the amount determined to be due each plaintiff for unpaid overtime compensation (C. T. 6). Each plaintiff propounded Interrogatories to the defendant, requesting detailed data as to each of the individuals named as plaintiffs, relating to the period of employment, time of termination, job duties and classification, hours worked and compensation paid. The nature and extent of the pleadings clearly showed knowledge and participation of each plaintiff for his individual purpose and benefit, contrary to the contentions of petitioner.

The case of Shane v. Armour, 40 F. Supp. 488, cited by Petitioner as a "collective" action requiring knowledge of the litigation on behalf of employees, is not a contrary authority. That case was a "class" suit brought by one plaintiff on behalf of other employees similarly situated. No other employees were specifically named in the amended complaint and no allegations as to specific amount of overtime employment were made with reference to any employee other than plaintiff (p. 489).

There is no conflict of opinion between the courts of appeal on this issue of the statute of limitations, and the petition presents no novel

questions as to the issue of written consent.

CONCLUSION

The decision of the court of appeals is sound in law and just in fact and does not require further review.

We respectfully submit that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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